No. 97-174

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commission,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE CITIZENS EQUAL RIGHTS ALLIANCE (CERA) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DOUGLAS Y. FREEMAN
Counsel of Record
LANA E. MARCUSSEN
BRIAN A. THOMAS
631 North Center
P.O. Box 429
Hardin, Montana 59034
(406) 665-1412

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

UNDER *YAKIMA COUNTY v. YAKIMA INDIAN NATION*, IS LAND ORIGINALLY PATENTED BY THE UNITED STATES GOVERNMENT, AND SUBSEQUENTLY REACQUIRED IN FEE SIMPLE BY INDIAN BAND, SUBJECT TO STATE AND LOCAL GOVERNMENT TAXATION IF IT REMAINS FREELY ALIENABLE IRRESPECTIVE OF STATUTE OR TREATY UNDER WHICH IT WAS ORIGINALLY CONVEYED?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
STATEMENT OF CASE	2
ARGUMENT	3
I. INTRODUCTION	3
II. THE 21 PARCELS OF LAND AT ISSUE ARE PRIVATE LANDS	4
A. Congress has Plenary Authority to Dispose of Tribal Lands	4
B. The Nelson Act was an Extinguishment act	7
III. CONGRESS DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO DELEGATE THE POWER TO THE EXECUTIVE BRANCH TO CREATE A PERMANENT INDIAN RESERVATION UNDER THE PROPERTY CLAUSE	12
IV. DID CONGRESS INTEND TO SEGREGATE THE LEECH LAKE BAND FROM THE IN REM AUTHORITY OF CASS COUNTY, MINNESOTA, BY RECOGNIZING THE BAND AS AN INDIAN TRIBE UNDER THE INDIAN REORGANIZATION ACT?	14
V. CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)	13
Alaska v. United States, 117 S.Ct. 1888 (1997)	6
Adarand Constructors, Inc. v. Federico Pena, 115 S.Ct. 2097 (1995)	17
Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937)	14
City of Boerne v. Flores, 117 S.Ct. 2517 (1997)	17
County of Yakima v. Confederated Tribes and Bands of Yakima Indians, 502 U.S. 251 (1992)	3, 10
DeCoteau v. District County Court, 420 U.S. 425 (1975)	7, 8
Downes v. Bidwell, 182 U.S. 244 (1901)	5
Duro v. Reina, 495 U.S. 676 (1990)	17
Elk v. Wilkins, 112 U.S. 94 (1884)	5, 6, 12, 13
Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810)	5
Goudy v. Meath, 203 U.S. 146 (1906)	11
Hagen v. Utah, 114 S.Ct. 958 (1994)	8
Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997)	14
Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)	4, 5, 11
Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D.Minn. 1971)	8, 9, 10
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)	5

TABLE OF AUTHORITIES – Continued

Page

Mille Lacs Band of Chippewas v. Minnesota, 861 F.Supp. 784 (1994) 9

Mille Lacs Band of Chippewas v. Minnesota, 853 F.Supp. 1118 (1994) 9

Montana v. U.S., 450 U.S. 544 (1982) 2

New Mexico v. Watkins, 969 F.2d 1122 (D.C.Ct.App. 1992) 6

New York v. United States, 505 U.S. 144 (1992) 2, 16, 17

Plessy v. Ferguson, 163 U.S. 537 (1896) 17, 18

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 6, 18

Printz v. United States, 117 S.Ct. 2365 (1997) 16

Romer v. Evans, 116 S.Ct 1620 (1996) 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 5

Scott v. Sandford, 60 U.S. 393 (1857) 4, 5, 15, 18

Seminole Tribe of Florida v. Florida, et al., 115 S.Ct. 1114 (1996) 14, 17

Seminole Tribe of Florida v. Florida, et al., 116 S.Ct. 1114 (1996) 14

Seymour v. Superintendent, 368 U.S. 351 (1962) 8

South Dakota v. Dole, 483 U.S. 203 (1987) 17

South Dakota v. U.S. Department of Interior, 69 F.3d 878 (8th Cir. 1995) (cert. denied May 1996) 12, 13

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 14

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Gratiot, 39 U.S. (14 Pet.) 525 (1840) 6

U.S. v. Midwest Oil, 236 U.S. 459 (1915) 6

United States v. Kagama, 118 U.S. 375 (1886) 13

United States v. Sandoval, 231 U.S. 28 (1913) 12

United States v. Winans, 198 U.S. 371 (1905) 12

Winters v. United States, 207 U.S. 564 (1908) 12

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 5

STATUTES

18 U.S.C. § 1151 (1994) 8

25 U.S.C. § 465 (1994) 2, 8, 10, 12

The Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. (1994) 6

The Indian Bill of Rights, 25 U.S.C. §§ 1301-1303 ...5, 6

The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. 5

The Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. 5, 10, 11, 14

The Naturalization Act of 1924, 8 U.S.C. § 1401 14

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

General Welfare or Spending Clause, Art. I, Sec. 8, Cl. 1 14

Nelson Act of 1889, 25 Stat. 642 .....11, 19

The Property Clause, U.S. Const., Art. IV, Sec. 3 .....2, 4, 5, 6, 11

The Enclave Clause, U.S. Const., Art I, Sec. 8, Cl. 17..... 6

U.S. Const. Tenth Amendment 2, 18

U.S. Const. Eleventh Amendment 14

U.S. Const. Fourteenth Amendment 2, 12, 16, 17, 18

INTEREST OF AMICUS CURIAE[1]

The Citizens Equal Rights Alliance (CERA), is a non-profit association of non-Indians and Indians incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this, CERA's interest mirrors that of the Petitioners. The Band's position that the lands purchased by the tribe are exempt from property taxes based upon a racial classification violates this principle.

SUMMARY OF ARGUMENT

This brief questions whether the Congress intended to segregate the Leech Lake Band from the full operation of the laws of Minnesota when it extinguished all but two Chippewa reservations in Minnesota. Judge Diana Murphy of the Eighth Circuit interprets Indian treaties to vest lands to Indian tribes even though the lands were only temporarily reserved from the land disposal acts. Congress has expressly disposed of the lands within these "boundaries," but because some nebulous gathering right was not absolutely, expressly extinguished, inherent

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

tribal sovereignty remains. Within this question arise fundamental constitutional issues under the Property Clause Art. IV, Sec. 3, the Tenth Amendment and the Fourteenth Amendment Equal Protection Clause. The basic argument relies on *New York v. United States*, 112 S.Ct. 2414 (1992) and *Montana v. U.S.*, 450 U.S. 544, 564 (1982), and then applies more recent decisions of the United States Supreme Court. Specifically, " . . . exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564.

STATEMENT OF CASE

The Leech Lake Band of Chippewa purchased fee land which had formerly been within their traditional use area. Congress expressly extinguished the traditional use area of the Leech Lake Band during the allotment era of federal Indian policy of the Dawes or General Allotment Act period. Pursuant to the Indian Reorganization Act, the United States recognized the Leech Lake Band of Chippewa. There is no Leech Lake reservation under the public domain. The Indian-owned lands comprise approximately 5% of the total area within the original reservation. The Band now claims, through the assistance of the United States, that the lands purchased in fee title are exempt from property taxes levied by Cass County, Minnesota. These reacquired lands are not subject to reservation or withdrawal or exist in trust status under 25 U.S.C. § 465.

The United States disposed of the land through application of the Dawes and Nelson Acts. These lands remain alienable, without any restrictions on alienation. Judge Murphy confuses Congressional disposal with individual sale of unencumbered land; she ignores the distinction between Congress alienating the lands from the Band, and tribal members legitimately transferring property that bears no onus of the federal trust status. The Eighth Circuit Court of Appeals relied on the type of disposal to incorrectly divine whether the purchased lands are subject to taxation. Sections 4 through 6 of the Nelson Act are timber sale and homestead provisions while Section 3 provided for direct allotment disposal. The Court of Appeals' surprisingly narrow interpretation of *Yakima County* created the distinction.

ARGUMENT

I.

INTRODUCTION

Judge Murphy's opinion in *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota* exemplifies what is wrong with Indian law today. The federal government, acting through the tribal party, asked the court to give what is not hers to give, by taking from the State of Minnesota what is not hers to take. The District Court properly found that *County of Yakima v. Confederated Tribes and Bands of Yakima Indians* disposed of the Chippewa claim to immunity from taxation. *County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251 (1992).

Under *Yakima* and the Nelson Act, the review is simple and the conclusion simpler: the federal government disposed of the lands. No amount of judicial activism can restore to the federal government and deny to the state jurisdiction that properly belongs in the state. Even more egregious, Judge Murphy's claim of a trust obligation's existence revives the divisive illogic of *Scott v. Sandford* coupled with the ill-considered paternalism of *Johnson v. McIntosh*. *Scott v. Sandford*, 60 U.S. 393 (1857); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). The answer to her challenge is clear: each and every individual within the boundaries of the disposed land within the boundaries of Leech Lake Reservation is possessed of rights derived from the Constitution of the United States – rights unadulterated by the Property Clause. In the case at bar, in 1889, Congress chose to protect those rights by allotting and selling the land. In doing so, Congress irretreivably committed the property to state jurisdiction.

II.

THE 21 PARCELS OF LAND AT ISSUE ARE PRIVATE LANDS.

A. Congress has Plenary Authority to Dispose of Tribal Lands.

Before discussing the role of "timber lands" and homestead lands granted under the General Allotment Act and its progeny, the Court must first define the power of Congress over the Leech Lake Band and its land. The Leech Lake Reservation consists of all private land. Lands withdrawn and reserved from the public

domain by definition remain "undisposed" and as "territory" under the Property Clause of the United States Constitution. U.S. Const., Art. IV, Sec. 3. Lands classified as "Indian country" are treated as territory as well. The Congress exercises plenary authority over territorial lands. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903).

Traditionally, this authority suffers no limitation from either the Constitution or the Bill of Rights. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Scott v. Sandford*, 60 U.S. 393 (1857). The asserted power of Congress over Indians relies on the Property Clause and the plenary interpretation given by Chief Justice Taney. U.S. Const., Art. IV, Sec. 3; *Scott*, 60 U.S. 393. In short, individuals existing on the territory of the United States are without rights save those the federal government sees fit to give.

Perhaps most sinister was the Chief Justice's reliance on Indian cases to justify slavery. *Scott*, 60 U.S. at 403 (citing *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1932); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1931); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810)). Only two decades after the Civil War came to an end, the Supreme Court resurrected its cause in a challenge to the Fourteenth Amendment. Cf. *Scott*, 60 U.S. at 403; *Elk v. Wilkins*, 112 U.S. 94 (1884).

In *Elk v. Wilkins*, the Court permitted a state to deny an Indian state citizenship. This extraordinary conclusion forms the premise of all modern Indian law. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq.; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. Premised

on *Elk's* logic, all persons physically on the reservation have only the rights allowed by Congress under the Indian Bill of Rights. 25 U.S.C. §§ 1301-1303.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides, "Congress shall dispose of the Territories . . . " U.S. Const., Art. IV, Sec. 3. The principle mandating disposal has long been upheld by this Court. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. See Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. Additionally, this Court recently required specific Congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); see also *New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App. 1992) (affirming in part, and on Property Clause grounds, 783 F.Supp. 633 (D.D.C.1992)).

Reserved lands cannot be federal enclaves under the Enclave Clause of the Constitution. U.S. Const., Art I, Sec. 8, Cl. 17. However, Congress could use the Property Clause to dispose of the lands as federal enclaves in accordance with the Enclave Clause' express provisions. Such a disposal would be proper because the Enclave Clause safeguards the States' sovereign jurisdiction within the federalist system. Had Congress acted properly to create tribal enclaves, both federal and state sovereignty would be protected and this Court would need go no further. Unfortunately, Congress has not done so.

B. The Nelson Act was an Extinguishment act.

In *DeCoteau v. District County Court*, this Court faced a not-dissimilar question of whether the state court possessed jurisdiction over specific lands in South Dakota. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The Sioux Tribe requested and obtained allotment of reservation land under the Dawes Act, and further agreed to terminate the reservation status. *Id.* Many years later, the Secretary of the Interior sought to reestablish tribal boundaries and to restore tribal jurisdiction. *Id.* Both Congress and the Executive declared the lands to be allotted and restored to the public domain. *Id.* Pursuant to the agreement reached between the Sioux Tribe and a commission, the tribal members received allotments of land and a fixed-sum disbursement from the federal treasury. *Id.* Years later, at the request of the Tribe, the Secretary of the Interior sought to singlehandedly restore the reservation to its prior boundaries. *Id.*

The *DeCoteau* Court determined that the State of South Dakota possessed jurisdiction because the reservation had been extinguished and could not be "restored" by the Secretary. In doing so, the Court established the process used to determine whether the use and occupancy rights of the Tribe were terminated. *DeCoteau*, 420 U.S. at 442-447. For the first time the court distinguished between extinguishment acts and surplus lands acts. A conclusion of termination indicates permanent extinguishment of all tribal interest in the land. To terminate there must be:

1. An initial act of Congress allowing modification of the land status;

2. A negotiated agreement to terminate;
3. A Congressional termination act of all right, title and interest of the Tribe;
4. Executive action confirming termination; and
5. Payment of just compensation specific to the lands designated for termination.

DeCoteau, 420 U.S. 425.

For the lands in question, the compliance with the Nelson Act met this exacting standard, as well as those expressed in more recent restatements from the Court. Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). Most importantly, the Secretary of the Interior possesses no continuing jurisdiction to modify the Chippewa Reservation. Since he cannot rely on FLPMA as authority within Minnesota to reserve federal lands or modify reservations, the Secretary must rely on the Indian Reorganization Act. 25 U.S.C. § 465. This provision provides very limited authority – none of which has been exercised in the case at bar.

The Eighth Circuit discussion of the Nelson Act is based upon an error which fails to acknowledge the impact of *Hagen v. Utah*, on the *Seymour v. Superintendent* interpretation of the criminal statute defining "Indian country." 18 U.S.C. § 1151 (1994). Compare *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Seymour v. Superintendent*, 368 U.S. 351 (1962). Following *Hagen*, the *Leech Lake Band v. Herbst* court inappropriately relies on *Seymour*. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001, 1005 (D.Minn. 1971). In doing so, it undermines those opinions which most directly relied on *Herbst*'s understanding.

See, e.g., *Leech Lake Band v. Cass County*, 108 F.3d 821 (opinion by Judge Murphy); *Mille Lacs Band of Chippewas v. Minnesota*, 861 F.Supp. 784 (1994) (same); *Mille Lacs Band of Chippewas v. Minnesota*, 853 F.Supp. 1118 (1994) (same). By relying on "Indian country" as an exemplar of tribal sovereignty, the Leech Lake Court ignored the principle that "Indian country" has no relevance to an express extinguishment act of Congress and can provide no limitation thereto. See *Hagen v. Utah*, 114 S.Ct. at 967. In no way can the Nelson Act be construed as anything but a disposal act. The Nelson Act disposed of all lands which had been reserved for the Leech Lake Band, under allotments, timber sales or homesteads. 25 Stat. 642. The Eighth Circuit Court of Appeals' extrapolation of this error to prevent the lawful operation of a proper disestablishment act only makes the error more needful of correction. Judge Murphy's expansive view of treaty cases which are no longer proper precedent have lead her to prevent extinguishment of treaty rights, where the disestablishment act required relinquishment of all right, title, and interest to the reservation. The Eighth Circuit has not reviewed the first impression ruling of *Leech Lake Band v. Herbst* after the case law on extinguishment developed in higher courts. The fundamental shift in higher precedent leaves the Eighth Circuit on uncertain ground and in need of redirection.

The Nelson Act functions as a complete disposal of the land either allotted (§ 3), sold as pine timber (§ 4 and § 5) or homestead lands (§ 6). The denomination as "pine lands" or as "homestead lands" is a distinction without meaning – the tribe retained no interest in those lands aside from the right to receive profit from their sale. 25

Stat. 642 §§ 5-6; but see *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820 (1997); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971). It is uncontroverted that the Nelson Act creates an appropriate disposal of land by the use of Congress' Property Clause power, and once disposal occurs, tribal jurisdiction is permanently at an end. *DeCoteau*, 420 U.S. at 447-49.

The reacquisition of land that was once within tribal boundaries leaves unchanged the nature of the land: it is Indian land held in fee simple. Whether disposed through timber sales, homesteads or individual Indian allotments it is reacquired Indian land held in fee simple. Since the lands are in fee simple, and they have not been placed in trust status, and are not subject to withdrawal order, the land is freely alienable. Indian Reorganization Act of 1934, 25 U.S.C. § 465. Alienable lands are ad valorem taxable. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

The Court of Appeals' decision in this case is most troubling because it impliedly grants an unlimited power to the Secretary of the Interior. The Secretary possesses authority to modify existing withdrawals and often does so. This power works to permit the alteration of land status currently held by the federal government. However, in the case at bar, the land is not owned by the federal government, it possesses neither sovereign title nor fee and the tribe seeks to invoke the limited secretarial authority to protect its relinquished lands with tribal jurisdiction. If such sleight of hand were permissible, every piece of land in the United States would be subject to the Secretary of Interior restoring the use and

occupancy rights of an Indian Tribe. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823). Such an interpretation contravenes both canons of construction and Art. IV, Sec. 3 of the Constitution.

The Eighth Circuit Court of Appeals ironically derives a claim to trust status from the land sold for timber uses. *Leech Lake*, 108 F.3d at 829. Rather than rely more heavily on allotted land in which the federal government retained a temporary trust interest, it emphasizes the timber land, in which the tribe possessed only a derivative interest in that profits from the sale were paid into a trust account. Cf. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq.; Nelson Act of 1889, 25 Stat. 642. Thus, from a direct financial interest in money, the court divined an interest in jurisdiction. *Leech Lake Band of Indians*, 108 F.3d at 829. Allotted, timber, and homestead lands differ only in the duration of the federal exercise of its racially-based, classification-derived trust obligation. The lands in question here all passed from trust patent title to full private title, and in doing so, divested the Secretary of the Interior of all authority to encumber alienability on those lands. As the District Court for the District Court of Minnesota properly found, alienable land is always taxable land. See generally, *Yakima*, 502 U.S. at 263; *Goudy v. Meath*, 203 U.S. 146 (1906).

III.

CONGRESS DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO DELEGATE THE POWER TO THE EXECUTIVE BRANCH TO CREATE A PERMANENT INDIAN RESERVATION UNDER THE PROPERTY CLAUSE.

Congress, like individuals, cannot give what it does not have. Similarly, it cannot delegate a power it does not possess. The Supreme Court faced this issue last term in issuing its Memorandum Opinion in *South Dakota v. U.S. Department of Interior*. *South Dakota v. U.S. Department of Interior*, 69 F.3d 878 (8th Cir. 1995) (opinion withdrawn). The appeal challenged the constitutionality of 25 U.S.C. § 465 as an unconstitutional delegation of legislative power to the Secretary of Interior.

Section 465 was a broad delegation of the power to create Indian reservations. These constitute permanent reservations of public domain use for a specific class of people because they do not undergo FLPMA review. *United States v. Sandoval*, 231 U.S. 28 (1913); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905). The delegation of power and lack of Congressional power leaves Congress completely unaccountable for the Indian reservation lands.

The authority to make such a classification of federal resources traces its origin to *Elk v. Wilkins*. *Elk v. Wilkins*, 112 U.S. 94 (1884). The *Wilkins* Court held that the Fourteenth Amendment did not apply to Indians, thereby reinvigorating Scott almost 20 years after its purported demise. *Wilkins'* progeny form the premise of 25 U.S.C. § 465 and reinforced Congress' reluctance to question Executive Branch regulation of the Indian tribes – even

though *Wilkens'* line relies on Congress' exclusive Property Clause authority.

The *South Dakota* attempt to end this unconstitutional delegation relies on *A.L.A. Schecter Poultry Corp. v. United States*. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Through Schecter Poultry and New York, the non-delegation doctrine expands to become the "political accountability" test. The test provides for the rights of citizens to hold their public officials directly accountable through stronger separation of power between all branches of government. In doing so, it affirms the fundamental necessary division between the roles the state and federal government must play in our federalist system.

There is no question that the Leech Lake Band operates largely immune to the views of the State of Minnesota. In no way can it be contended to be a subdivision of the state or to derive its authority from the state. *United States v. Kagama*, 118 U.S. 375 (1886). The nontribal residents of alienated land within the Leech Lake Reservation, were Judge Murphy's understanding to survive this Court, possess no means to obtain governmental accountability from their state or the territorial governors. Above all else, the Leech Lake Band of Indians is not accountable.

IV.

DID CONGRESS INTEND TO SEGREGATE THE LEECH LAKE BAND FROM THE IN REM AUTHORITY OF CASS COUNTY, MINNESOTA, BY RECOGNIZING THE BAND AS AN INDIAN TRIBE UNDER THE INDIAN REORGANIZATION ACT?

Even after the Naturalization Act of 1924, 8 U.S.C. § 1401, made Indians full citizens, the Congress of the United States passed the Indian Reorganization Act (IRA), June 18, 1934, ch. 576, § 1, 48 Stat. 984, 25 U.S.C. § 461, et seq., which places the "Indian trust" obligations under the General Welfare or Spending Clause, Art. I, Sec. 8, Cl. 1. The New Deal administration was very aware of this combination of constitutional authority being asserted. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937). It was no accident that the IRA was proposed as the means to "civilize the tribes."

In the lower court opinion, Judge Murphy places tribal inherent sovereignty rights ahead of the sovereign right of Cass County, Minnesota. This directly contradicts this Court's recent rulings in *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997); *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). These Eleventh Amendment cases demonstrate that tribal governments and tribal members are state citizens and subject to the Eleventh Amendment bar of state sovereign immunity. *Coeur d'Alene* confronted a federal lands question (which sovereign holds title to the bed of the river) and held that the in rem jurisdiction to decide what in effect was a quiet title action was vested in the Idaho courts. The Coeur d'Alene Tribe challenged the public trust responsibility of

Idaho and was told to present their claim to the courts of Idaho. Putative Indian tribal sovereignty has blossomed into a fundamental challenge to the public trust doctrine and the balance struck in *Montana v. United States*. *Montana v. United States*, 450 U.S. 544 (1981). It is time to inspect the foundation of this challenge.

Chief Justice Taney, in the fourth section of *Scott*, relied on "territorial land status" to justify a permanent trusteeship over all of the people in a territory. He did this by allowing the formation of civil authority as necessary

> " . . . to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time and the choice of the mode must depend on the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority . . . "

Scott, 60 U.S. 449-52. *Scott v. Sandford* intentionally restructured federalism by redefining "sovereign people" to fit the federal government's general trust reponsibility over the People. *Id.* To this day, Black's law dictionary defines "sovereign people" by reference to *Scott*.

The IRA combines this Scott-based power into a "general welfare" format, and in doing so, completely displaces the federalism balance of the constitutional structure by extending the territorial trust status against People residing in the states. This is a power that cannot last. It represents virtually unlimited authority over People because through it, the federal government can compel states to enforce federal laws against the People. Limited instances of this power appear in *New York v. U.S.*

– a challenge to federal mandates – and no doubt will continue to appear until the power is checked.

Federal mandates that compel a state official to enforce a federal program are unconstitutional. *Printz v. United States*, 117 S.Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). The power asserted at Leech Lake by the United States is of the same source, but is the reversed image of the federal mandate found to be flawed. A mandate is a direct order. The asserted power of the federal government at Leech Lake is an indirect displacement of the normal operation of state law in assessing a county property tax on alienable lands re-aquired by an Indian Tribe.

Federally-derived tribal status cannot prevent a state official from enforcing the everyday operation of a state law enforcing in rem jurisdiction, unless Congress directly preempts it. In truth, the usurpation of the state-based public trust has existed longer and in more areas of law than direct mandates to the states; direct mandates are the unwanted stepchildren of the virulent conflux of the Property Clause and the Tax and Spend Clause. See generally *Printz v. United States*, 117 S.Ct 2365 (discussing appearance of mandates in the 1970's). To allow the subtle and insidious side of this power to be constitutional while ruling the direct and more accountable power unconstitutional defies the analysis of *New York v. United States*. *New York*, 505 U.S. 144.

The solution to the indirect power is the same as to the direct power. Congress must act directly to impose a Property Clause or Section 5 of the Fourteenth Amendment restriction on a state. Lacking a direct delegation of

authority from Congress, the Executive Branch has no authority to displace operation of state law by commandeering the public trust. Congress' power under the Spending Clause to create incentives for the states by offering federal funds for the adherence to federal programs is now well discussed. *Printz*, 117 S.Ct 2365; *New York*, 505 U.S. 144; *South Dakota v. Dole*, 483 U.S. 203 (1987). The indirect power avoids incentives, and relies on threatened litigation or actual litigation against the state for enforcement. With this in mind, it is unsurprising that the United States has served as Amicus in this matter from early in the litigation.

Even if Congress created special status in the Indian tribes through the IRA, the Supreme Court retains the power to review the act for constitutionality. The power to define discrimination under the equal protection clause of the Fourteenth Amendment resides in the courts under Art. III of the Constitution. *City of Boerne v. Flores*, 117 S.Ct 2517 (1997). *Adarand Constructors* states that the Fourteenth Amendment Equal Protection Clause applies to the Federal government under the same standard as applies to the States. *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995). Congress cannot use its Article I authority, specifically the Indian Commerce Clause, to interfere with Article III judicial review. *Seminole*, 115 S.Ct 1114 (1996).

The Supreme Court can confront the IRA as an unconstitutional segregation of rights using an Equal Protection standard. See, e.g., *Romer v. Evans*, 116 S.Ct. 1620 (1996); *Duro v. Reina*, 495 U.S. 676 (1990). *Romer* expressly overruled *Plessy v. Ferguson* and its "separate but equal" standard in its entirety. Cf. *Romer v. Evans*, 116 S.Ct. 1620;

Plessy, 163 U.S. 537 (1896). Ruling federal segregation of Indians unconstitutional would end the federal authority to deny Indians the right to own land, and in doing so, would allow Indian sovereignty to remain, protecting the very real cultural values of each Indian tribe.

The IRA is federally-enforced segregation which preserves an unconstitutional combination of territorial war and general welfare powers – against the rights of all the People. The expropriation of the public trust by the federal government prevents the transfer of municipal sovereignty to states. The ongoing abuse of territorial status serves to denude the state of the responsibility to manage itself for its people; leaving the people without a separate sovereign to hold accountable. While this reality may not violate the Equal Footing Doctrine of *Pollard's Lessee*, it is difficult to believe that it does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution. By enacting differing Enabling Acts for each state, the federal government asserts a power to reserve additional rights or displace in rem state authority for new uses or newly acquired lands, causing discrimination and creating separate classes of citizens. In doing so, it violates the principles of federalism repeated in the Tenth Amendment of the Constitution. The Tenth Amendment expressly reserved all unallocated powers to the states in an attempt to prevent the result made into law by *Scott v. Sandford*.

In 1981, in the face of a federal assertion that as Trustee for the Crow Indian Tribe, the government and the Tribe had sole authority to regulate hunting and fishing within the Crow Tribe Reservation, the Court ruled that the title to the bed of the Big Horn River

passed to Montana upon its admission into the Union. *Montana v. United States*, 450 U.S. 544 (1981). It is significant to note, in the context of the instant case, that the Court in Montana states that

> "as a general principle, the Federal Government holds lands under navigable rivers in trust for future states, to be granted to such states when they enter the Union. There is a strong presumption against conveyance of such lands by the United States; . . . the United States will not be held to have conveyed such land except because of 'some international duty or public exigency' . . . "

Montana, 450 at 552. The Court in *Montana* found that since the 1851 and 1868 treaties between the United States and the Crow Tribe did not expressly refer to the river bed, its language was not strong enough to overcome the presumption against the sovereign's conveyance of the same. The presumption of the public trust and general welfare must favor the majority over a distinct segregated minority if the Constitution is going to survive. If there is a question of Congressional intent to allow taxation of Indian owned lands it is in favor of the states. *Yakima*. *Montana* found the balance in 1980, it is simply a matter of enforcing the balance.

V.

CONCLUSION

This Court should reverse the Eighth Circuit ruling as to Sections 4 and 5 of the Nelson Act and confirm Cass County's authority to tax the fee lands of the Leech Lake Band of Chippewa. It is time to declare the Indian people

full and equal citizens subject to all the benefits and responsibilities of full land ownership. The Indian land owners in Leech Lake have held onto their allotments for over 100 years. Ad valorem property taxes being assessed are a small price to pay for obtaining full constitutional rights.

Respectfully submitted,

Douglas Y. Freeman
Lana E. Marcussen
Brian A. Thomas